

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 89-643-C - ORDER NO. 90-988

OCTOBER 29, 1990

IN RE: Application of NCN Communications,       ) ORDER DENYING  
          Inc. for a Certificate of Public        ) CERTIFICATE OF  
          Convenience and Necessity            ) PUBLIC CONVENIENCE  
  ) AND NECESSITY

This matter comes before the Public Service Commission of South Carolina (the Commission) by way of an Application filed on February 16, 1990, by NCN Communications, Incorporated, (NCN or the Applicant) seeking a Certificate of Public Convenience and Necessity to resell intrastate telecommunications services in the State of South Carolina. The Application was filed pursuant to South Carolina Code Ann. Section 58-9-520 (1989) and the Commission's Rules and Regulations.

The Applicant is incorporated under the laws of the State of Arizona, and its principal place of business is 1440 North Fiesta Boulevard, Suite 100, Gilbert, Arizona. It has approval to transact business as a foreign corporation in the State of South Carolina, and seeks to be granted authority to resell intrastate long distance telephone service provided by major nationwide interexchange carriers such as MCI Telecommunications, Inc. (MCI) and American Telephone and Telegraph Company (AT&T).

The Application was duly noticed to the public and separate Petitions to Intervene were filed on behalf of Steven Hamm, the Consumer Advocate for the State of South Carolina (the Consumer Advocate) and on behalf of Southern Bell Telephone and Telegraph Company (Southern Bell). On May 23, 1990, by its Order No. 90-536, the Commission ordered NCN to cease and desist its intrastate operations in the State of South Carolina, including but not limited to the billing and marketing of its services on an intrastate basis. This Order was entered at the request of the Consumer Advocate who informed the Commission that NCN was presently doing business in the State of South Carolina without a Certificate of Public Necessity, and after NCN requested a continuance at the scheduled public hearing convened on May 17, 1990, because of the unavailability of the Company witness.

The rescheduled hearing relative to the matters asserted in the Application was held in the Hearing Room of the Commission at 111 Doctors Circle at 11:00 a.m., on Tuesday, September 25, 1990, before the Commissioners, with Chairman Marjorie Amos-Frazier presiding. Paul A. Dominick, Esquire, appeared on behalf of the Applicant; Carl F. McIntosh, Esquire appeared on behalf of the Consumer Advocate; Caroline N. Watson, Esquire, appeared on behalf of Southern Bell; and Marsha A. Ward, General Counsel, appeared on behalf of the Commission Staff.

The Applicant had scheduled the appearance and pre-filed the testimony of Mr. Jeffrey G. Williams. However, because Mr. Williams was unable to appear at this rescheduled hearing, the Applicant presented the testimony of Harold K. Redden, an NCN

Regional Director who adopted the pre-filed testimony and described the services and operations of NCN. Southern Bell presented the testimony of Mr. C.L. Addis, Staff Manager, Regulatory Matters with Southern Bell. The Commission Staff and the Consumer Advocate introduced no witnesses.

The record in this matter establishes and the Commission makes the following findings and conclusions:

1. NCN, organized in 1987, is a foreign corporation registered to do business in South Carolina. It operates as a non-facilities based reseller of telecommunications services. According to witness Redden, NCN is presently licensed to provide service in all except four states - South Carolina, North Carolina, North Dakota, and West Virginia.

2. Before granting to any applicant a Certificate of Public Convenience and Necessity to operate as a reseller of telecommunication services in this State, it is the duty of this Commission to determine that the applicant is fit, willing, and able to provide the applied-for service and that it is in the interest of the public to grant the applicant the Certificate. This determination must be based on our review of the applicant's legal and managerial qualifications, technical capabilities, and financial standing. We must take into consideration the experience and resources of the applicant in terms of its ability to provide the requested service to the community. For the reasons set out below, we find that NCN is neither fit nor able to provide the applied-for service:

- a. The officers and management of NCN identified to the

Commission lack the experience and technical know-how and support to effectively manage and operate a telecommunications resale service in this State. The Application filed by NCN with the Commission states "[t]he officers of NCN have extensive managerial, financial, legal and technical experience with which to execute the business plan described herein", and lists the management biographical information of six individuals. However, a monthly newsletter of NCN included as a part of Hearing Exhibit No. 1, contains the information that on May 17, 1990, the officers and Board of Directors of NCN resigned their positions and announced the election and appointment of new officers that same day. Three individuals were listed as new officers, Tom Norfleet, a former National Sales Director, was named Chairman of the Board; Charles Brisbee was named President and Chief Executive Officer; and Bill Walker, another former National Sales Director, was named Senior Vice President. Biographical information for two of the three new officers is included in the DPS-Training manual (Hearing Exhibit No. 1). Tom Norfleet, the new Chairman of the Board, is described as the principal architect of a national sales recruiting and training program used by another network marketing based long distance Company, Network 2000. He has been involved in real estate development in Texas and California; helped launch a cosmetics firm in Dallas; managed a line of personal motivation, sales training, and management development courses; and was the founder of Word Records of Waco, Texas. Bill Walker, the new Senior Vice President for NCN, worked with Mr. Norfleet in the network marketing of Network 2000; had been involved in

fund-raising campaigns in real estate and energy; worked in the life insurance industry and in creating personal development seminars. He also worked as a Test Site Manager for the Manned Space Center in Houston, Texas and with Rockwell International. Neither possesses any background in telecommunications, utilities, regulated industries or any other field directly or indirectly related to the provision of telephone service to the public. Most, if not all, of their experience relates to training and the sale of training. There is no evidence in the record as to the qualifications of Charles Brisbee, the third new officer of NCN. The emphasis on sales and marketing, particularly the so-called "multi-level" marketing approach employed by the Company as opposed to the provision of reliable telecommunications services is foreign to this Commission and the telephone utilities it has certified as interexchange carriers in this State. While the principals of NCN may be qualified in sales and marketing, the Commission finds that they lack the required telecommunications experience and qualifications expected by this Commission

b. We have also examined the qualifications of the witness chosen by the Applicant to represent it at the hearing on this matter. The Commission notes that Mr. Redden serves as one of five or six Area Directors set up in this State by NCN, and also works part-time as a food broker, a job he has held for fifteen years. He spent six years in the military and graduated from a Lutheran college in Minneapolis, Minnesota. We also note that he was somewhat under-informed as to NCN though he testified that he had been with them for more than half of their two year history.

He testified that he had no prior telecommunications experience and that he did not believe such experience was necessary. Our review of the qualifications of the individuals identified in the record as present members of NCN management, does not indicate that they possess the necessary experience, technical preparation and expertise to adequately manage and/or supervise the specialized nature of the telecommunication business they seek to establish in this State. We believe that experience in the telecommunications field or in fields directly akin to it is a necessary component of the totality of experience required to effectively manage as a reseller in this State.

c. In addition, the record indicates that the Applicant has failed to provide full information on the known or likely changes in ownership of NCN. Mr. Redden testified that he was aware that NCN as a whole or in part had been purchased by the Gentry Group. Such an acquisition would be negotiated over a period of time; therefore, NCN should have been aware that a change in the ownership of NCN was possible, even if not completed, some time before the September 25, 1990, hearing. Yet no information on even the possibility of such an acquisition was provided to the Commission prior to the hearing date and the Applicant's witness was unable to provide further information at the hearing. The failure of NCN to provide specific, up-to-date information on its ownership and management, leaves this Commission with insufficient information upon which to analyze NCN's organization and structure. We have the names of only three of the Applicant's officers, and no information on its Board of Directors. The record is devoid of any

information on the new owners of NCN, the Gentry Group. Based upon the absence of information in the record as set out above, the Commission cannot make the necessary determination that NCN possesses the type of organization, ownership, and structure which will allow a company to fulfill the obligations of a reseller of telecommunications service in this State.

d. The marketing method employed by the Applicant may, in the Commission's opinion, encourage or at the least lend itself to instances of fraudulent solicitation practices and misrepresentation of services because of the lack of control by NCN over its marketing force. In 1989, NCN began using a so-called "multi-level" network marketing method to sell long distance service to customers. The entire thrust of the NCN marketing program is to encourage individuals to buy the Data Processing Service and Training Package (training package) and long distance service, become Independent Distributor's (ID's), and acquire customers who will then go out to acquire more customers who will in turn buy the training package and long distance service and become ID's. Under this method of acquiring customers, NCN establishes and, in some cases certifies, persons recruited from the general population to act as Independent Distributors of NCN. The ID is the individual who will carry out the marketing of the telecommunication services offered by NCN. They personally represent the Applicant to the general public. They have the responsibility of explaining each aspect of the telecommunications services the Applicant will offer, the benefits to the customer of the choice of the Applicant for long distance service as compared

to the choice of another carrier or reseller, the company's billing practices, etc. Yet under the plan as submitted to this Commission, these ID's do not work as employees of NCN and are therefore not under its direct regulation and control. The Applicant has set no specific qualifications as to who may become an NCN ID. In fact, NCN witness Redden stated that the only requirements as to who can become an ID is that NCN would like for them to be able to read and write and use the telephone. Not only does NCN fail to prescribe any real qualifications to become a member of its marketing force, but, once an individual is acting as an NCN independent distributor, NCN exercises no control over the "means, methods and manner of operation" they choose. See Hearing Exhibit No. 2. Though the Applicant's witness insists that there is no need for training since the business of acting as a reseller is "too easy", he states that if the ID desires training, NCN makes training available to those ID's who purchase a training package at a cost of \$230.00. The Commission notes that of the materials included in the training package (Hearing Exhibit No. 1), only a few relate to the products and services of the Applicant. The greater proportion of these training materials relate to how to sell rather than to what is being sold. Mr. Redden attempted to demonstrate that, even though the ID may receive no training and even though NCN exerts no control over the way the ID carries on his solicitations, an ID would not misrepresent the long distance carrier to the potential customer because if he did so it would affect his compensation. He went on to say that, as a rule, the customer was not even informed of the identity of the long distance carrier used by NCN since NCN



did not "sell the carrier". Further, he stated, that even if the customer asked for the name of the long distance carrier, the answer made no difference since all carriers use fiber optics. Such responses show a lack of appreciation for the real differences that exist in the reseller marketplace and the need of the ratepayers of South Carolina to receive accurate information sufficient to enable them to make an intelligent, fact-based choice of telecommunications services. This Commission requires that a company providing reseller service in this State exercise more control over those who are in a position to possibly misrepresent its services to the ratepayer than merely having it "show up on their paycheck". At that point the damage is done.

e. Moreover, we note that Mr. Redden was obviously mistaken as to his belief that the Company does not "sell the carrier". Hearing Exhibit No. 4, is a copy of a letter sent to Mr. C. L. Addis, the witness testifying for Southern Bell, from North Greenville College introducing NCN's services to Mr. Addis and urging that he choose NCN as his long distance carrier. That Exhibit states that "all technical services used by NCN customers are provided by AT&T and MCI" and further urges that "you may call AT&T at 1-800-525-3413 to verify the participation of NCN in this program." The realities of resale service does not allow a reseller to truly ascertain who will carry its traffic since a long distance call may be routed by the facilities based carrier through any carrier which can transport it to its appropriate destination. However, this type of solicitation, which leads the customer to rely on the good will, credit and reputation of the facility based

carrier rather than that of NCN, is misleading to the subscriber. At the very least it allows NCN to borrow some of the good will of that carrier. Where the subscriber is encouraged to substitute the reputation of the long distance carrier for that of the soliciting company, as NCN did in the Greenville College solicitation, subsequent changes in the carrier used by NCN may lead to confusion among the subscribers. The total marketing plan employed by NCN encourages this type of problem because of the lack of direct control by the Applicant on its proposed marketing force.

f. The marketing plan submitted by the Applicant will encourage a lack of faith in the Commission in carrying out its regulation of the telephone utility. The independent distributor plan used by NCN, as noted above, not only lacks any real qualifications or training for its marketing force, but it also leaves the ID without direct supervision from the Company in soliciting and servicing the ratepayer. Though the Independent Distributor Agreement contains language which is intended to establish the ID as an independent contractor for tax, general agency and contract purposes, the ID of necessity represents NCN to the general public. He is then, at least, an agent for the Applicant for the purposes of solicitation and contracting. He explains the services, charges and billings of NCN. The customer relies on his representations in making his choice of carrier. NCN therefore has a responsibility to assure that these solicitations and contracting are carried out with due regard to the rules and regulations of this Commission. Yet NCN does not include in its business plan adequate controls to assure that these ID's will act

in a responsible manner in conformity with Commission rules and regulations. Such lack of controls will inevitably lead to ratepayer complaints to this Commission concerning the relationship between the ratepayer and NCN as we are charged with the responsibility of regulating this area.

g. The Applicant places more emphasis on the sale of training materials than on the sale of telecommunications service to potential long distance customers. The function of the ID, according to Mr. Redden and the Applicant's documents, is to acquire customers and, if the ID desires, to attract other distributors who will also in turn acquire customers. However, our review of the promotional materials distributed by the Company indicates that there is a stronger primary emphasis on acquiring new Independent Distributors and then selling to them the DPS-Training package than there is on acquiring new long distance customers. Though the Supplement and Addendum to the NCN Opportunity Booklet, effective July 1, 1990, (Hearing Exhibit No. 1) shows that the Applicant is now requiring that its new ID's list four new customers before they can receive the \$40.00 "bonus" on the sale of the DPS-Training package to new ID's, the thrust is still on increasing profit to the ID through the sale of the training package. As stated in the Supplement and Addendum:

[s]hould a distributor desire to build an organization and earn overrides on the long distance usage of customers signed up by other distributors in the downline, the distributor is encouraged to purchase the DPS-Training package. This package is invaluable in preparing and equipping the distributor for this important and potentially profitable opportunity.

The profit from the sale of these training packages

accounted for 54.5% of the total revenues of the Applicant for the period ending November 20, 1989, and should equal to more than 62% of the total revenues for the year ending September 30, 1990. Though the Applicant's witness testified that the percentage of training sales as a proportion of total revenues should decline with time, the increase in training sales revenues as to the long distance sales revenues does not bear this out. In addition, Hearing Exhibit No. 1 also includes on a new direct sale of training materials to and through the ID. NCN's new "Profit Builder" plan is described in NCN promotional literature as a package including a "training manual, 'free gift' buttons, banners, display signs, trifold brochures, request forms and special supply order forms." The ID is encouraged to purchase the "Profit Builder" from NCN at \$54 each and sell them to any small business or professional such as accountants, tax preparers, chiropractors, garages, hair salons, tanning salons, dry cleaners or any other retail outlet that has substantial customer traffic. There is no mention of training of this cadre of "customer getters". Instead, the small business purchaser of this plan is told to read the manual and if he has a question, call the ID who sold him the plan. The "Profit Builder" plan is but another example of NCN's reliance on direct sales of training in salesmanship versus the delivery of quality telecommunications service for the ratepayer. This Commission finds that the Applicant places insufficient emphasis on service to the long distance customer, and that this deficiency is another indication of the unfitness of the Applicant for a Certificate of Public Convenience and Necessity.

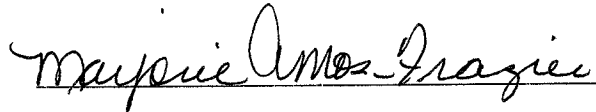
h. The Applicant has neither contracted with nor identified a long distance carrier certified in this State through whom it will provide the service. The Application and various other NCN documents state that NCN intends to resell intrastate long distance service by contracting with "nationwide interexchange carriers" such as AT&T or MCI. The evidence in the record, however does not support this contention. Though Hearing Exhibit No. 2, dated January 1990, contains references to a relationship between AT&T and NCN, NCN witness Redden did not establish that this relationship was ongoing. Rather, Redden testified that MCI was the long distance carrier for NCN in most states, yet both witness Redden and counsel for NCN spoke of existing litigation between MCI and NCN regarding these contracts. The Commission is left with the impression that any contractual relationship between NCN and MCI may be subject to termination. Mr. Redden testified specifically that NCN has not identified a long distance carrier for the State of South Carolina at this time, though NCN is attempting to develop a verbal agreement with Allnet for that purpose. The Commission has caused its records to be searched in order to determine if Allnet is certified as a long distance carrier in this State. That search indicates, and the Commission takes judicial notice of the fact, that Allnet is not certified as a long distance carrier in the State of South Carolina. Therefore, even if NCN is successful in reducing to writing the purported verbal agreement between itself and Allnet, NCN would still be without a long distance carrier with whom it can contract in this State for long distance resale service. Though it is not absolutely necessary that an

applicant for resale authority have specified the long distance carrier with whom it will do business in this State at the time of its application herein, the failure of NCN to determine if the carrier with whom it is attempting to negotiate is even qualified to provide that service in this State is another indication to this Commission that the Applicant lacks the experience and ability to meet the qualifications of a reseller in this State.

i. Further, it was brought out during the hearing that NCN had violated the Cease and Desist Order issued by the Commission on May 23, 1990, wherein the Commission ordered NCN to cease and desist providing intrastate service in South Carolina, including the billing and marketing of its services, until such time as its Application for a Certificate of Public Convenience and Necessity was approved by the Commission. Witness Redden admitted that NCN billed its customers during July, 1990, for intrastate service in South Carolina. See Hearing Exhibit No. 3. Mr. Redden admitted that he was an NCN customer and had been similarly billed in July and that he had paid that bill. Mr. Redden offered no explanation for this violation of the Commission's Order nor did he explain how this matter had been rectified, if at all. NCN's disregard for a valid Commission Order while its Application is pending causes the Commission to closely scrutinize the operations and qualifications of the Company. The Commission is wary of granting a Certificate to an Applicant who violates a strict order of the Commission. The disregard for this Order during the pendency of the certificate request is reason enough for the Commission to deny the certification requested by NCN.

The culmination of the aforementioned deficiencies of NCN regarding its lack of telecommunications background, its insufficient emphasis on providing telecommunications services, the lack of qualifications of its sales force, including their lack of knowledge of the services being provided; and particularly the violation of Order No. 90-536, causes the Commission to determine that NCN is not fit, willing and able to provide resold intrastate interexchange telecommunications service in South Carolina, including the marketing and billing thereof, and it would not be in the public interest to grant NCN a Certificate of Public Convenience and Necessity.

BY ORDER OF THE COMMISSION:

  
Chairman

ATTEST:



Executive Director

(SEAL)